Supreme Court of the United States

OCTOBER TERM, 1941.

No......

AXEL HAWKINSON,

Petitioner and Appellee below,

VS.

GEORGE GASTON JOHNSTON,

Respondent and Appellant below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported 119 Fed. (2d) 110, and appears in the record at pages 112 to 123.

II.

JURISDICTION.

The petition (ante page 1) states the grounds on which the jurisdiction of this Court is invoked. For brevity, that statement is not here repeated.

III.

STATEMENT OF THE CASE.

The petition, under the heading "Summary and Statement of Matters Involved," (ante pages 2 to 8), sets forth a full statement of the case. For brevity, that statement is not here repeated.

IV.

SPECIFICATIONS OF ERROR.

1. The United States Circuit Court of Appeals for the Eighth Circuit erred in remanding the case below, where the District Court (Tr. 104-108) directed verdict for defendant at the close of plaintiff's case because of the absence of evidence required by Missouri law to establish fraudulent misrepresentations of solvency relied on by plaintiff to avoid a compromise release, and in holding (Tr. 116-117) that a submissible *prima facie* case of fraud was established, by a mere inference, first drawn in the opinion, from an asserted failure to fully answer a question in a deposition (Tr. 88) taken under Rule 26, (which was not answered because the question was nullified and abandoned by interposition of another question), where petitioner's attention was not directed to any alleged failure to answer it and no opportunity for answer was given, especially where no proceeding followed under Rule 37 to require answer and where defendant, although present in court, was not interrogated by plaintiff under Rule 43 (Tr. 104-108).

2. The decision is contrary to the usual course of judicial proceedings and pointedly ignored applicable Federal Rules of Civil Procedure numbered 26, 37 (a) and 43 (b), duly called to the Court's attention (Tr. 130) and nullifies them for the Eighth Circuit.

3. The decision conflicts with the well-established rule that a verdict may not rest on a mere inference based on non-disclosure in the absence of any other evidence, and in holding (Tr. 116-117) that such inference constituted substantive proof of facts required by Missouri law to establish a *prima facie* case of fraud through misrepresentation of solvency, which was pleaded by plaintiff to avoid a compromise release.

4. The decision conflicts with the rule declared by this Court that an inference based on non-disclosure may not be substituted for substantive proof of facts required to establish a *prima facie* case for the party carrying the burden of proof.

5. The decision conflicts with the well-settled rule that no inference may reliably be drawn from premises which are uncertain; nor may legitimate inferences be drawn from other inferences, nor presumptions indulged which rest upon the basis of another presumption.

6. The unjustified inference of fraud, based on asserted failure to fully answer a question asked but abandoned in a deposition, which inference first originated in the Circuit Court of Appeals, contrary to the usual course of judicial proceedings, and in nullification of Federal Rules of Civil Procedure No. 26, 37 (a) and 43 (b), prejudicially affects petitioner personally and officially as Vice Consul of Sweden.

V.

SUMMARY OF ARGUMENT.

1. Inferior Federal Courts may not nullify Federal Rules of Civil Procedure by disregard and draw inferences contrary to their letter and spirit.

2. Inference equivalent to substantive evidence of *prima facie* fraud may not rest alone on an asserted incomplete answer to an abandoned question in a deposition taken under Rule 26, where opportunity to answer was not given and no proceedings followed under Rule 37 (a) to require answer, and defendant present in court was not interrogated under Rule 43 (b).

Such ruling is contrary to the usual course of judicial proceedings and on the record here unfortunately prejudicially affects petitioner officially as Royal Vice Consul of Sweden.

3. The District Court in directing verdict for petitioner followed Missouri law in ruling that proof of solvency requires evidence of liabilities or their absence to show ability to pay debts from assets in the usual course of business.

4. Plaintiff may not establish a *prima facie* case by studiously avoiding Federal Rules of Civil Procedure to develop the facts, and then claim an inference of fraud through non-disclosure by propounding and abandoning a question in a deposition taken under Rule 26, where no opportunity was given to answer and no action was taken under the Rules to require answer.

5. The opinion conflicts with decisions of other Circuits holding that affirmative evidence is required to sustain the burden of proof and that it is not met by absence of evidence.

6. While an inference from non-disclosure may strengthen other evidence, it is never potent to prove a fact of which there is no evidence.

7. The opinion conflicts with decisions of this court holding that a failure to testify cannot supply any fact not reasonably supported by substantive evidence in the case and that an inference from non-disclosure cannot be substituted for substantive proof of facts required to establish a *prima facie* case.

8. No inference may be drawn from uncertain premises, nor may legitimate inferences be drawn from other inferences.

9. Verdict should be directed unless the burden of proof is met with substantial evidence.

10. The opinion erroneously rests on a fact based on inference, instead of seeking to draw an inference from an established fact.

VI.

ARGUMENT.

Two questions of paramount general public importance tend to overshadow even the erroneous prejudicial result suffered by petitioner. They are:

(1) May any inferior Federal Court nullify applicable Federal Rules of Civil Procedure directly called to its attention (Tr. 130), by utterly disregarding them and then draw an inference contrary to the spirit and letter thereof and not supported by the record? (Cf. *Los Angeles Brush Mfg. Corp.* v. *James,* 47 S. Ct. 286, 272 U. S. 701, 71 L. Ed. 481.

(2) May a Circuit Court of Appeals first originate an inference and declare it equivalent to substantive evidence of fraud when the inference is based solely on an asserted incomplete answer to an abandoned question submitted in a deposition (Tr. 88, fol. 120) where no evasion was attempted by petitioner and he was neither directed to nor given an opportunity to answer, and no proceedings followed under Rule 37 (a) to require answer and where the matter was never raised in the trial court and petitioner was not interrogated under Rule 43 (b)?

These questions obviously inhere in the opinion. The result is contrary to the usual course of judicial proceedings in courts of the United States. The opinion unfortunately as well casts an unjustifiable reflection on petitioner officially as Royal Vice Consul of Sweden, as plaintiff saw fit to introduce parts of petitioner's deposition showing his official position, as an alleged admission made by petitioner against his interest. The theory of that as an admission, is no more novel than the theory of asserted admission of fraud by inference, disclosed in the opinion below.

The facts are stated in the petition, and for brevity are not again reviewed. Brief reference is made to the cases and principles which apply.

(3) The District Court correctly followed the Missouri law in directing verdict for petitioner. It requires a showing of liabilities as well as assets to establish solvency. Solvency under Missouri law is ability to pay one's debts from assets in the ordinary course of business. Debts have to be shown before ability to pay is determinable.

Jack v. *O'Meara,*
(Mo.), 122 S. W. (2d) 897, 903, subd. 4.
Akin v. *Hull,*
222 Mo. App. 1022, 9 S. W. (2d) 688, l. c. 690.
Vandeventer v. *Goss,*
116 Mo. App. 316, 91 S. W. 958, 961.

Compare, *Fort Dodge Hotel Co.* v. *Bartlett,* 8th Cir., 119 Fed. (2d) 253, l. c. 258, subd. 10-16, an opinion of other judges of the same circuit, filed the same day as the opinion here. There controlling state law is followed. It is held proof of necessary elements is of the "very substance" of the case of a party carrying the burden of proof and the obligation is imposed to establish every fact essential to make out a cause of action. The same rule applies, of course, to an affirmative defense.

(4) The Circuit Court of Appeals pointedly refused to apply applicable Federal Rules of Civil Procedure numbered 26, 37 (a) and 43 (b), duly called to its attention (Tr. 130).

(a) Defendant's attention was not directed to any failure to answer the question on which the entire opinion is based (Tr. 88). If plaintiff desired the question

answered, petitioner was entitled to a reasonable opportunity for answer before plaintiff interposed another question. It was incumbent upon plaintiff to call petitioner's attention to any alleged failure to answer. The minimum requirements of fair play alone, independent of the Rules, demands at least that much. If answer was refused, full remedy was provided by Rule 37 (a).

Vendola Corp. v. *Hershey,*
1 F. R. D. 360.
Sibbach v. *Wilson & Co.,*
85 L. Ed. 349, adv. op. 61 S. Ct. 422.
Lewis v. *United Air Lines,*
31 F. S. 617.
Etten v. *Kaufmann,*
25 F. S. 215, subd. 6.
Coca Cola Co. v. *Dixi-Cola Lab.,*
30 F. S. 275, subd. 1-3.

Even before the present rules, it was held in *Fahrney & Sons* v. *Ruminer,* 7th Cir., 153 Fed. 735, l. c. 738, that no inference may be drawn from a direct refusal to answer questions before a Special Master, where the opposing party failed to press the matter in court to require an answer. It is there held the record stood just as if the questions were never propounded.

(b) Defendant was in court when parts of his deposition were introduced but was not interrogated by the plaintiff under Rule 43 (b), although the trial court specially requested plaintiff (Tr. 104-105) to indicate what evidence disclosed falsity of any representations made by petitioner. The theory first originated in the decision of the Circuit Court of Appeals, was not advanced nor mentioned (Tr. 105). Under these circumstances, the inferences, if any, would be exactly opposite that drawn.

National Bondholders Co. v. *McClintic,*
4th Cir., 99 Fed. (2d) 595, l. c. 600.
Article—1 F. R. D. l. c. 346.
Article—1 F. R. D. l. c. 522.

Masonite Corp. v. *Hill,* 154 So. 295, 95 A. L. R. 157, l. c. 161, holding that an adverse inference may arise against the party carrying the burden of proof if he fails to introduce explicit evidence capable of production.

See also:

Manchester Bank of St. Louis v. *Harrington,*
(Mo.), 199 S. W. 242, 249.

Resort to any of the many methods of discovery created by the present rules would have taken the matter out of the realm of speculation. Plaintiff studiously sought to keep from destroying his case by avoiding developing the facts. The ambuscade was saved for appeal. Approval of that system denies jurisprudence as the science of justice and tends to destroy confidence in the courts.

(5) The decision directly conflicts with decisions of the Circuit Courts of Appeal of the Second, Fourth, Sixth and Seventh Circuits, as follows:

W. F. Corbin & Co. v. *United States,* 6th Circuit, 181 Fed. 296, l. c. 304, 305, holding that a presumption from silence may strengthen other evidence but without other evidence there is no basis for such presumption.

See also,

Smith v. *Pennsylvania R. Co.,*
2nd Circuit, 239 Fed. 103, l. c. 104, 105.

N. Y. & Cuba Mail S. S. Co. v. *Cont. Ins. Co.,* 2nd Circuit, 117 Fed. (2d) 404, 408, subd. 4, that burden of proof is not met by absence of evidence from the opponent but affirmative proof is required.

Owens Bottle-Mach. Co. v. *Kanawha Banking & T. Co.*, 4th Circuit, 259 Fed. 838, l. c. 842, 843, holding that where the burden of proof rests on plaintiff, a failure to produce evidence furnishes no inference against defendant whose case rests on a denial.

Fahrney & Sons v. *Ruminer*, 7th Circuit, 153 Fed. 735, l. c. 738, cited *supra.*

Such an inference is insufficient to establish fraud or reliance thereon.

Compare:

DeRoode v. *Sheppey*,
6th Cir., 32 Fed. (2d) 634, subd. 1, 5, 6;
Holman v. *Gulf Refining Co.*,
5th Cir., 76 Fed. (2d) 94, subd. 1, 2, 4;
Ponder v. *Delauney*,
14 S. Ct. 1208, 154 U. S. 651, 38 L. Ed. 1092;
Cleaveland v. *Richardson*,
10 S. Ct. 100, 132 U. S. 318, 33 L. Ed. 384.

(6) The opinion conflicts with the well-established rule that while an inference from silence may give persuasive force to evidence of the adversary it is never potent to supply independent evidence of a fact unproved by other evidence.

Diel v. *Mo. Pac. Ry. Co.*,
37 Mo. App. 454, l. c. 459.
Allen West Commission v. *Richter*,
228 S. W. 827, 286 Mo. 691, subd. 6, 7.
Chicago, M. & St. P. Ry. Co. v. *Harrelson*,
14 Fed. (2d) 893, l. c. 896 (C. C. A. 8).
Shidloski v. *New York, C. & St. L. R. Co.*,
333 Mo. 1134, 64 S. W. (2d) 259, l. c. 263, 264.
Frohman v. *Lowenstein*,
303 Mo. 339, 362, 260 S. W. 460, l. c. 466.

(7) The opinion conflicts with applicable decisions of this court, as follows:

Mammoth Oil Co. v. *United States,* 275 U. S. 13, 52, 48 S. Ct. 1, 72 L. Ed. 137, 151 ruling that a failure to testify cannot properly be held to supply any fact not reasonably supported by the substantive evidence in the case.

See also extensive *Annotation,* 70 A. L. R. 1326, and cases reviewed.

Hanson v. *Eustace,* 2 How. (U. S.) 653, 11 L. Ed. 416, holding an inference from non-disclosure cannot be substituted for substantive proof of facts required to establish a *prima facie* case for the party carrying the burden of proof. Such inference is not sufficient even though non-disclosure follows a direct notice to produce.

See also:

Northern Ry. Co. v. *Page,*
274 U. S. 65, l. c. 74, 47 S. Ct. 491, 71 L. Ed. 929, l. c. 932.

(8) The opinion conflicts with the well settled rule that no inference may be reliably drawn from premises which are uncertain; nor can legitimate inferences be drawn from other inferences, nor presumptions indulged which rest upon the basis of another presumption. The inference of answer by producing income tax return and of evading full answer by non-disclosure of liabilities is denied by the record (Tr. 88, fol. 120). The premise for the inference is non-existent, and not merely uncertain.

Phillips v. *Trav. Ins. Co.,*
288 Mo. 175, 231 S. W. 947.
United States v. *Ross,*
92 U. S. 281, 23 L. Ed. 707.

Manning v. *John Hancock Mut. L. Ins. Co.*,
100 U. S. 693, 25 L. Ed. 761.
Looney v. *Metropolitan R. Co.*,
200 U. S. 480, 50 L. Ed. 564, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627.
Pennsylvania R. Co. v. *Chamberlain*,
288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819.

(9) The opinion conflicts with the Federal and Missouri rule, that substantial and more than a mere scintilla of evidence is required to support a verdict and that a verdict should always be directed unless the burden of proof is sustained by substantial evidence.

Small Co. v. *Lamborn & Co.*,
267 U. S. 248, 254, 45 S. Ct. 300, 303, 69 L. Ed. 597.
Penn. Ry. Co. v. *Chamberlain*,
288 U. S. 333, 53 S. Ct. 391, 395, 77 L. Ed. 819.
Transamerican Freight Lines v. *Marcrome Art Co.*,
(Mo. App.) 150 S. W. (2d) 547, 551, subd. 3, 4, 5.
Grange v. *C. & E. I. Ry. Co.*,
334 Mo. 1040, 69 S. W. (2d) 955.
Scotten v. *Met. Life Ins. Co.*,
336 Mo. 724, 81 S. W. (2d) 313.

(10) The opinion erroneously establishes "a fact based upon an inference, instead of seeking to draw an inference from an established fact."

Pape v. *Aetna Casualty Co.*,
(Mo. App.) 150 S. W. (2d) 569, l. c. 572, subd. 2, 3.

The record and opinion insistently presents important questions of general public importance, decided contrary

to the usual course of judicial proceedings, which should be finally determined by this Court.

We respectfully and earnestly submit that the case justifies and impels the issuance of this Court's writ of certiorari.

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